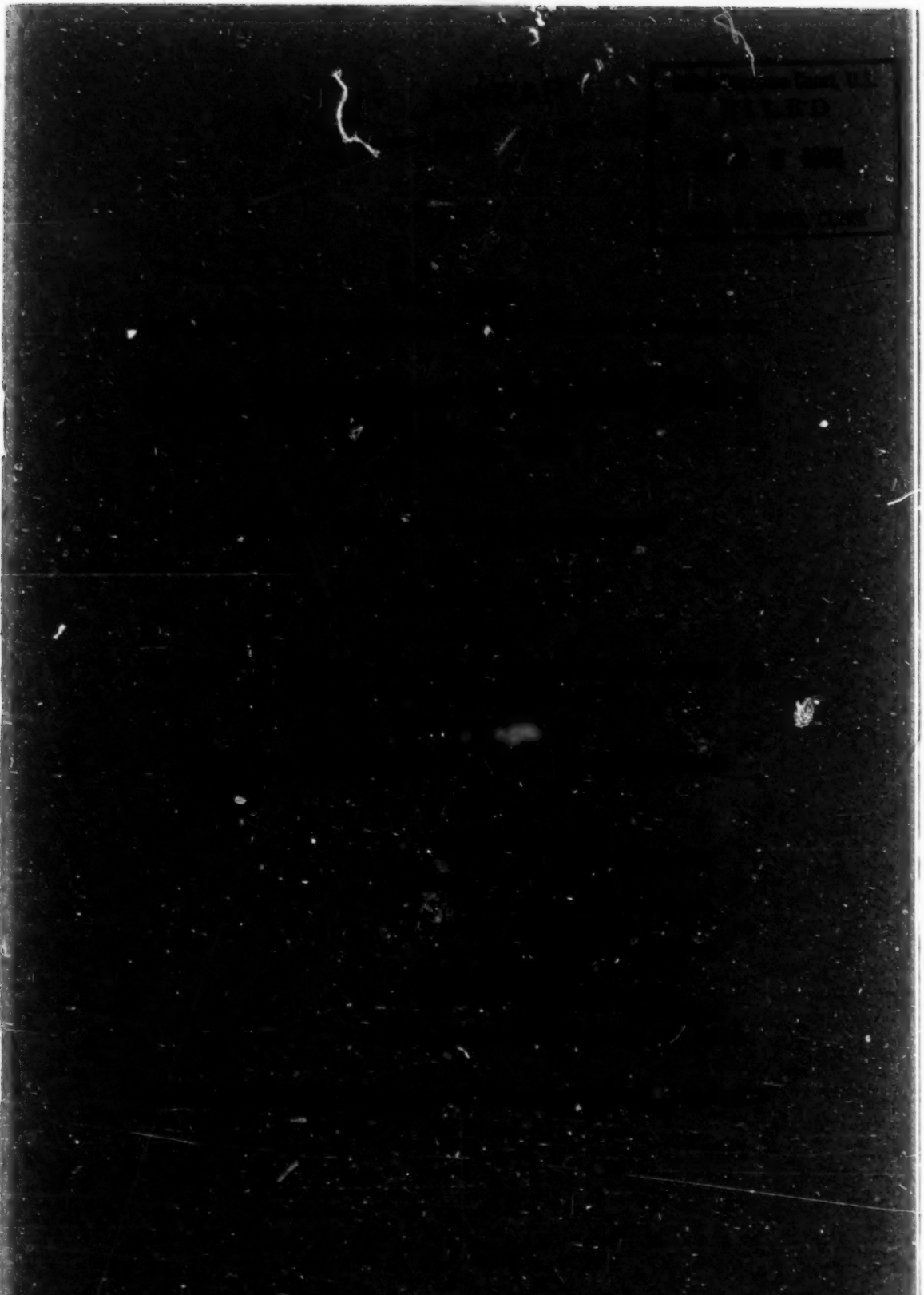

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 623

FRED S. CALHOUN, ET AL., PETITIONERS

v.

A. C. LATIMER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the court of appeals (R. 229–254, 258–259) are reported at 321 F. 2d 302. The opinions of the district court (R. 160–165, 18–30, 48–53, 156–160) are reported at 188 F. Supp. 401, 412; 217 F. Supp. 614.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963 (R. 254), and a petition for rehearing *en banc* was denied on August 16, 1963 (R. 259). The petition for a writ of certiorari was granted by this Court on January 13, 1964 (R. 260). The jurisdiction of the Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Atlanta plan of school desegregation, initiated three years ago, proceeds at the pace of one grade a year, beginning with the twelfth grade and progressing downward; it perpetuates a dual school system, in which assignments are originally made on the basis of race, and permits transfers only to the school most proximate to the student's residence; and it preserves total segregation of school personnel.

The question presented is whether such a plan proceeds "with all deliberate speed" and is calculated to achieve complete desegregation "at the earliest practicable date."

INTEREST OF THE UNITED STATES

The effective implementation of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, is a matter of continuing national concern. The government has accordingly participated in the prior school cases which have come before this Court. The instant case is of general significance in that it is the first to involve broadly the merits of a school desegregation plan.

STATEMENT

A. THE ORIGINAL DESEGREGATION PLAN

This action was initiated on January 11, 1958, by Negro pupils and their parents to desegregate the public schools of Atlanta, Georgia (R. 2).[1] Nearly

[1] Negro citizens of Atlanta had started to petition the Board of Education to desegregate the public school system almost three years earlier in 1955 (R. 4–5).

eighteen months later, on June 5, 1959, the case came on for trial (R. 9), and on June 16, 1959, the district court rendered an opinion in which it found that racial discrimination existed in the operation of the Atlanta schools (R. 160–162).[2] The court said that it was "compelled to enjoin racial discrimination" and gave the school board an opportunity to submit "a plan whereby racial discrimination will be discontinued" (R. 164, 165).

On July 9, 1959, the district court issued an order enjoining the respondents from "enforcing and pursuing * * * racial segregation in the operation of the public schools of the City of Atlanta, and from engaging in any and all action which limits or affects admission to, attendance in, or education of" Atlanta's Negro students in that City's schools (R. 9). The court ordered respondents to submit a plan for desegregation by December 1, 1959, "contingent upon the enactment of [State] statutes permitting such plan to be put into operation" (R. 9). The court also indicated that its judgment was not final and that it would retain jurisdiction of the case (R. 10).[3]

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[2] The school board contended that the racial "separation" arose through the choice of the Negroes themselves (R. 162).

[3] The order provided (R. 10): "This Judgment of the Court is not a final Judgment in the case and the Court retains jurisdiction of this cause for the purpose of entering such further orders or granting such further relief as may be necessary to bring about compliance with this decree and during such time as may be necessary to put into effect the defendants' plan."

1. APPROVAL OF THE PLAN

On December 1, 1959, the day on which the period for submitting a plan expired, respondents tendered their proposal to the court (R. 10–16). After citing various administrative problems faced by the school board—such as rapid urbanization, influx of children of varying achievement and ability, new school construction, shortage of classrooms (R. 10–12)—the plan provided that "[i]n the assignment, transfer or continuance of pupils" the Superintendent of schools should consider eighteen criteria (R. 12–13). These criteria were substantially identical to those of the Alabama pupil assignment law upheld as constitutional on its face in *Shuttlesworth* v. *Birmingham Board of Education,* 358 U.S. 101, affirming 162 F. Supp. 372 (N.D. Ala.).[4] The plan authorized the Superintendent to require interviews with pupils or their parents and to conduct such examinations and investigations as he deemed appropriate (R. 14). A fifteen-day period was established in which transfer

[4] Among the criteria were "the psychological qualification of the pupil for the type of teaching and associations involved," "the possibility of breaches of the peace or ill will, or economic retaliation within the community," "the home environment of the pupil," and "the morals, conduct, health and personal standards of the pupil" (R. 12–13). Some of these criteria were eliminated by court order or suggestion; others have been voluntarily abandoned by the respondents. While various of these factors were applied in each year the plan has operated, only one factor—not included in the original plan—is currently considered when a pupil applies for a transfer, *viz.* proximity to the school to which transfer is requested (Br. in Opp. 10–11, 27–28). See also p. 13 below.

requests could be submitted each year (R. 13) and a procedure for administrative appeal and review was prescribed (R. 14–16). The plan stated that "[a]ll existing school assignment shall continue without change until or unless transfers are directed or approved by the Superintendent or his duly authorized representative" (R. 13). Finally, the plan provided that it would begin to operate in the twelfth grade on "September 1, 1960, or on September 1, following favorable action by the General Assembly of Georgia," and "each successive year, the plan shall be expanded to the immediate lower grade" (R. 16).

On December 12, 1959, petitioners filed objections to the plan (R. 17), and a hearing was held on these objections on December 14, 1959 (R. 200–228). At the hearing, petitioners objected to the plan's failure to eliminate the dual school system (R. 201), its continued assignment of Negro children on the basis of race, and its imposition of the burden of transferring on the Negro children (R. 214). They explained that (R. 214):

> [T]he school authorities are required to assign some Negro children to white schools; and that this is the only way in which the school authorities meet their duty to desegregate. What they have done is to shift the duty to the Negro community once again and say now I have reassigned you on a basis of race, where it is your duty to come forward again and try to get out. We think that the initial assignment on the basis of race is unconstitutional. * * *

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Petitioners also complained that respondents had not demonstrated the need for a period of twelve years in which to accomplish desegregation (R. 208–209)[5] and that the plan did not provide for the assignment of school personnel without regard to race (R. 213).[6]

These objections were rejected by the district court on December 30, 1959 (R. 18). The court noted that (R. 19):

> Essentially the Plan contemplates that all pupils in the schools shall until and unless transferred to some other school, remain where they are, all new and beginning students being assigned by the Superintendent or his authority, to a school selected by observance of certain standards as set forth in the proposed Plan.

However, other objections of the petitioners to the plan, which are not pertinent to the issues here, were sustained by the court, and respondents were ordered to amend the plan (R. 30). An amended plan was submitted (R. 32), which was approved by the court on January 20, 1960 (R. 38).

2. IMPLEMENTATION OF THE PLAN

On February 26, 1960, petitioners filed a motion for further relief in which they requested that the plan be ordered into effect on May 1, 1960, despite the fact that the Georgia Legislature had adjourned without

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[5] The district court responded that it was its intention "to put just as much emphasis on the deliberation as it does on the speed" (R. 221).

[6] Other objections to the plan, not pertinent to the issues here, were also made.

amending or repealing any of the Georgia laws which provided for closing or withholding State funds from schools in which races were mixed (R. 38–43). On March 9, 1960, the district denied the motion, but ordered that a hearing be held (R. 43–47).[7] On May 9, 1960, following the hearing, the court postponed implementation of the plan until the fall of 1961, but required that it then be applied to both the eleventh and twelfth grades (R. 47–48).

3. OPERATION OF THE PLAN IN 1961

The plan was inaugurated in 1961. Between May 1 and May 15, 1961—the only period during which transfer requests under the plan could be submitted (R. 35)[8]—approximately 300 white and Negro students in the eleventh and twelfth grades requested

[7] On March 9, 1960, the petitioners filed a notice of appeal from the district court's order entered that day (R. 174, 176). On March 24, 1960, petitioners moved to dismiss the appeal (R. 173–174). Pursuant to court order (R. 174–175), the motion to dismiss was amended on April 2, 1960, at which time petitioners explained that "in light of the fact that the court set May 9th, 1960 as the date for hearing plaintiffs' motion for further relief, plaintiffs decided to withdraw the appeal and to proceed with the hearing on May 9, 1960" (R. 176). On April 5, 1960, the district court granted the motion to dismiss the appeal (R. 176).

[8] Applications of whites for transfers to "white schools" and Negroes for transfer to "Negro schools" were considered "informal" transfers and could be submitted throughout the year without regard to the provisions of the plan (R. 94–96). The court of appeals, in its opinion on the petition for rehearing in 1963, directed that the plan be applied to all transfers, whether formal or informal (R. 258).

transfer applications and 129 Negroes and one white actually submitted them (R. 65).[9]

The Negro students were subjected to various tests and interviews and, finally, ten Negro students[10] were selected to enter four formerly all-white high schools (R. 68).[11] All the other students were assigned to the schools which they had formerly attended (R. 62–63).

B. THE MOTION TO MODIFY THE PLAN

On April 30, 1962, petitioners filed a motion for further relief (R. 53). They objected that the students seeking transfer in 1961 were subjected to tests not applied to white students attending the white schools and that respondents were continuing a dual school system based on race in the grades which were

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[9] There are approximately 100,000 school children in Atlanta, about 45 percent of whom are Negroes (R. 59). As of 1961, there were 113 elementary schools, grades one through seven, and 22 high schools, grades eight through twelve (R. 231). Forty-one of the elementary schools were all-Negro while seventy-two were all-white (R. 231). Five of the high schools were all-Negro and seventeen all-white (R. 231).

[10] The basis for selecting the ten were "their reasons for wanting to transfer, their achievement in relation to the norm for the school to which they were requesting a transfer, and their proximity to the school" (R. 68; cf. R. 97). In applying the second factor, the School Board required that a transferee score a grade on certain tests that was at least equal to the average test score of the class to which transfer was requested (R. 232).

[11] One of the 130 students who sought transfer was a white student who requested to move from Northside High School (white) to Dykes High School (white) because Northside had been designated as a school to which Negroes would be admitted. This student's application was denied. See *Stone* v. *Members of the Board of Education of Atlanta*, 309 F. 2d 638 (C.A. 5) (R. 66, 231).

nominally desegregated under the plan (R. 55–56). Consequently, petitioners claimed, the plan had maintained, not ended, segregation (R. 56), and the district court was requested to afford the following relief (R. 57):

> (1) enter an order enjoining defendants from continuing to maintain and operate a segregated biracial school system in the City of Atlanta, specifically enjoining defendants from maintaining and operating "white" and "Negro" schools, and from assigning pupils to schools on the basis of race, and from assigning teachers to schools on the basis of race, and from designating and constructing "Negro" and "white" schools, and from maintaining a dual scheme or pattern of school zone lines based on race, and from supporting, approving, or sanctioning extracurricula school activities limited to one race or the other, and from continuing to make any other distinctions in the operation of the public school system of the City of Atlanta which are based wholly on race and color;
>
> (2) in the alternative, plaintiffs pray that this court require defendants to come forward with a complete plan for the reorganization of the entire biracial school system of Atlanta, Georgia, into a unitary non-racial system, which plan shall include a new plan for the assignment of pupils on a non-racial basis and a plan for the assignment of teachers on a non-racial basis, for the construction of schools on a non-racial basis, for the drawing of school zone lines on a non-racial basis, for reorganization of extracurricula school activities on a non-

> racial basis, and for the elimination of any other discriminations in the operation of the schools of Atlanta, Georgia, based on race and color.

Respondents opposed petitioners' motion for further relief and denied "that they have 'assigned' children to particular schools either on the base of race, color or otherwise, the fact being that the placement plan previously approved by this Court contemplated and provided that students in the Atlanta School System should continue to attend the schools which they were already attending, except that said plan provided that in the 11th and 12th grades students might apply for transfer * * *" (R. 79). Respondents concluded that petitioners were attacking "the plan of desegregation approved by this Court, which * * * [has] now become final and binding * * *" (R. 81).

1. THE PROPOSED PLAN

On July 20, 1962, petitioners filed a new desegregation plan (R. 82–83). It provided for desegregation of the five high school grades—the eighth through twelfth—in September 1963, the fourth through seventh grades in September 1964, and the remaining three grades in September 1965 (R. 82). Under the plan, all school zone lines were to be redrawn and students in the immediate vicinity of the schools were to be assigned without regard to race (R. 82). In addition, existing discrimination in the assignment or training of school personnel and in the organization of extracurricular activities was to be eliminated (R. 82–83; see also R. 239).

2. THE DISTRICT COURT HEARING

The following evidence was introduced in connection with petitioners' motion for further relief:

Dr. John Walter Letson, Superintendent of Schools in Atlanta, explained the procedure followed in making school assignments. He stated that, in September 1960, elementary and high school "[p]upils who had attended a school previously were assigned to the same school. Those who were beginning students were assigned to the same school attended by their neighbors" (R. 61; see also R. 62). Dr. Letson testified that Negro students moving from a Negro elementary school were assigned to a Negro high school and white students were similarly assigned to a white high school (R. 62–63, 99–100). The superintendent indicated that this same assignment method, except for students whose transfers were approved, was followed in 1961 after the plan went into effect (R. 63).

Dr. Letson explained that Atlanta uses school zones to equalize the attendance in the elementary and high schools where necessary (R. 61–62, 98). Where they exist, separate zones are drawn for Negro and white schools, so that when housing is racially mixed, the zones overlap (R. 61–62, 98). The same zones continued to exist, with only slight variations, after the desegregation plan was adopted (R. 61–62). While Dr. Letson testified that the zones were not rigid and were not indicated on an "official" map, he admitted that, except where transfers are permitted, the separate zones prevented Negroes from attending white schools (R. 77, 98).

Dr. Letson conceded that teacher assignments continued to be based on race (R. 72–73).[12] One of Atlanta's five area superintendents is a Negro, but there are no white schools under his jurisdiction (R. 72).

Transfer applications for the school year beginning September 1962 were received by the School Board between May 1 and May 15, 1962—while petitioners' motion for further relief was pending in the district court. Dr. Leston testified that approximately 300 applications for transfer to the tenth, eleventh and twelfth grades had been received and that, unlike in 1961, special tests were not administered to these students (R. 70, 105–106). However, a student applying for transfer was still expected to attain the average score for the class in the school to which he desired to transfer, on tests that were administered throughout the Atlanta school system (R. 70). Dr. Letson also explained that proximity of the school would be considered and that interviews would continue to be conducted (R. 70–71). Of the approximately 300 Negro students who applied for transfers in 1962, forty-four requests were granted (R. 94).

The district court found that Atlanta was not operating a dual school system based on race in the grades which were, according to the plan, desegregated (R. 158). It concluded that, since the original plan had been administered in good faith, there was no reason

[12] The application form for certification as a teacher in Atlanta requires that the applicant indicate his or her race (R. 92).

for modifying it (R. 159–160). Accordingly, the motion for further relief was denied.

3. THE DECISION BELOW

The court of appeals, Judge Rives dissenting, affirmed (R. 229, 245). Like the district court, it also postponed consideration of petitioners' contention that Atlanta was unconstitutionally assigning teachers and other personnel on the basis of race (R. 157, 244).

On petitioners' request for a rehearing *en banc* (R. 255), the court (acting through the same panel) denied the petition but, at the same time, ordered that certain "deficiencies" in the Atlanta plan (which were noted in its original opinion) be eliminated for the 1963–1964 school term (R. 258). The "deficiencies" related to the application of different criteria to Negro and white students seeking transfers. The court concluded that respondents could not continue to require that Negro students seeking transfer to a formerly all-white school be subjected to a "personality interview" and scholastic ability and achievement tests, unless similar requirements were imposed on white students who desired to transfer to the same school (R. 258–259). Accordingly, the only criterion now applied by respondents in considering an application for transfer is proximity to the school to which transfer is requested (Br. in Opp. 10, 27–28). The new standard, applied in the current school year, has resulted in the approval of 119 of 191 requests for transfer by Negro students in 1963 (*id.* at 28).

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ARGUMENT

INTRODUCTION AND SUMMARY

1. When *Brown* v. *Board of Education*, 347 U.S. 483, was decided in 1954, the Court noted that, because the cases involved were class actions, "because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity" (347 U.S. at 495). Accordingly, the Court postponed its decision on the relief to be granted until after further argument on certain specified questions, notably: "[M]ay this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?" (347 U.S. at 496, n. 13).[13]

A year later, the question propounded by the Court was answered affirmatively. *Brown* v. *Board of Education*, 349 U.S. 294. The Court again acknowledged that good faith compliance with the fundamental rights declared in the first *Brown* case "may re-

[13] Prior to *Brown*, it had become well established that the constitutional right of Negroes to be free from discrimination on account of their race is a present right, entitled to immediate enforcement. This principle prevailed in the field of higher education, *Sipuel* v. *Board of Regents*, 332 U.S. 631; *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637; in voting, *Smith* v. *Allwright*, 321 U.S. 649; in interstate travel, *Henderson* v. *United States*, 339 U.S. 816; in property ownership, *Shelley* v. *Kraemer*, 334 U.S. 1; in employment, *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88; and in jury service, *Ex parte Virginia*, 100 U.S. 339.

quire solution of varied local school problems" and might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision" (349 U.S. at 299–300). Accordingly, the Court did not require immediate and full implementation of its decision but permitted the transition to a racially non-discriminatory school system to proceed "with all deliberate speed" (Id. at 301).

In allowing a period of transition, the Court made clear, however, that certain basic ground rules would have to be observed. First, it was necessary that there be "a prompt and reasonable start toward full compliance." Second, "[o]nce such a start has been made"—and by implication, not before—additional time may be granted to carry out desegregation in an effective manned. Third, "[t]he burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date" (349 U.S. at 300). Finally, after setting out certain narrowly defined problems related to school administration that might justify delay,[14] the Court stressed that "it

[14] The Court noted that the implementation of its decision on the merits might "call for the elimination of a variety of obstacles in making the transition to [desegregated] school systems" (349 U.S. at 300) and set forth the considerations it had in mind (349 U.S. at 300–301): "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact

should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them" (*Id.* at 300).

Three years later, in *Cooper v. Aaron*, 358 U.S. 1, 7 the Court elaborated the meaning of *Brown:*

> Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward

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units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulation which may be necessary in solving the foregoing problems."

> initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

Following *Cooper* v. *Aaron,* there was a considerable period during which the implementation and interpretation of the *Brown* decisions was left to the lower federal courts. But last year, in two opinions, the Court again directed its attention to the scope of the school desegregation decisions.

In *Watson* v. *City of Memphis,* 373 U.S. 526, 529–530, the Court used this pertinent language:

> * * * the second *Brown* decision, * * * which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered * * * in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine * * * [W]e cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of the decree ultimately framed in the *Brown* case. Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring

> that desegregation proceed with "all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. *Brown* never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial barriers in schools * * *.

And in *Goss* v. *Board of Education of Knoxville, Tennessee*, 373 U.S. 683, 689, the Court indicated that the expressions "good faith compliance at the earliest practicable date" and "all deliberate speed" cannot be given the same meaning today as at the time of the *Brown* decision. The Court stated (*ibid.*):

> Now, however, eight years after this decree was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans of desegregation has been significantly altered.

Ten years have now elapsed since the first *Brown* decision. In the intervening period, the aim in many places has been to delay rather than to desegregate. The concept of speed has frequently been subordinated to that of deliberation.[13] Among the methods which have been devised to assure that the process of desegregation be well braked are the two which are at issue in this case—the use of a grade-a-year plan and the continued assignment of students to

[13] In the eleven southern states, only 1.06% of the Negro children attend school with white students. Considering these eleven states, the six border states, and the District of Columbia together, the figure is 9.2%. *Southern School News*, December 1963, p. 1, cols. 1–5.

schools on the basis of race with the burden on the Negro child to seek a transfer if he desires a desegregated education.

2. It is against this background that the Atlanta plan, approved by the courts below, must be judged. In our view, there was scant justification for a twelve year plan in 1960, five years after this Court had enjoined school authorities to eliminate segregation "with all deliberate speed." But, whatever may be said in support of the original approval, it is now patent that administrative difficulties do not stand in the way of accelerating the grade-a-year pace of desegregation. We therefore conclude (Point I) that petitioners were plainly entitled to the moderate revision they proposed, which would achieve desegregation of all grades in 1965.

But undue delay is not the only flaw of the Atlanta plan. Indeed, perhaps more serious is the failure of school authorities to desegregate effectively even those grades reached by the plan. The actual experience in the nominally desegregated high school classes is accurately described as "tokenism." It results from the perpetuation of a dual school system, in which pupils, however "informally," are originally assigned on the basis of race. As we show (Point II), this vice alone condemns the plan in suit. Nor can it be cured by a liberal transfer policy—much less the discriminatory option plan still applied in Atlanta. Here, also, we support petitioners' prayer for a revised plan which will eliminate the residual discrimination in the nominally desegregated grades.

Finally (Point III), we join petitioners in urging the desegregation of school personnel. That step, it seems to us, is essential to the achievement of a truly non-discriminatory school system.

I

THE ATLANTA GRADE-A-YEAR PLAN DOES NOT ACHIEVE DESEGREGATION WITH ALL DELIBERATE SPEED

The Atlanta plan provides for the desegregation of the city's schools at the rate of one grade each year, starting with the twelfth grade and ending with the first. The plan was first put into operation in 1961, at which time the eleventh and twelfth grades were "desegregated." Nominal desegregation of all grades of the school system will not be achieved until 1971.

There was a time, perhaps, when progress at the rate of one grade each year could be reasonably viewed as necessary delay. Immediately after *Brown*, legitimate obstacles to a swift change-over might have seemed insuperable, and, for the first few years, that slow pace may have been justified. But, since then, ample notice and the opportunity for actual experience have foreclosed the claim that "administrative difficulties" are so great, or so imponderable, as to require deliberateness of that order. The plain fact is that everyone has long since known *how* to proceed without confusion or chaos, and that, except for deferring to hostility, there has been, for some years, no practical impediment to a much speedier transition.

It follows, in our view, that the pace of desegregation must be accelerated. Indeed, that seems to be the teaching of *Goss* and *Watson*.[16] And that is true largely without regard to the date on which actual desegregation was first initiated, for it can hardly be supposed that those school boards which delayed longest in recognizing the rights of Negro students should have more time to accommodate themselves to the constitutional mandate than those which, in good faith, made a prompt start. So saying, however, we do not discount the importance of looking to local conditions; nor do we suggest that the peculiar history of desegregation in each community is irrelevant. We stress only that a late start does not justify moving forward at the inordinately slow pace of one grade per year.

In this context, we examine the Atlanta plan. In Atlanta, clearly, there is no present obstacle to acceleration. A late-starter, the Atlanta School Board has enjoyed three years of actual experience in which to make a leisurely accommodation. The time is past due for more emphasis on "speed" and less on "deliberation."

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[16] See, also, *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63, 64 (C.A. 5) ("* * * the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of years since the first and second *Brown* decisions"); *Jackson* v. *School Board of City of Lynchburg, Virginia*, 321 F. 2d 230 (C.A. 4); *Goss* v. *Board of Education of City of Knoxville*, 301 F. 2d 164 (C.A. 6), reversed on other grounds, 373 U.S. 683; *Evans* v. *Ennis*, 281 F. 2d 385 (C.A. 3); *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 500, 501–502 (C.A. 5).

A. CIRCUMSTANCES SUGGESTING ACCELERATION

The lapse of ten years since the declaration of a present constitutional right alone suggests a need for acceleration in the rate of desegregation. But, in this case, there are additional reasons for stepping up the pace.

1. Atlanta did not make "a prompt and reasonable start toward full compliance." For nearly two and a half years following the second *Brown* decision respondents refused to act on petitions by Negro parents requesting school desegregation. In 1958, this suit was filed, but another year and a half elapsed before the case came on for hearing. Respondents then argued that the racial "separation" in the Atlanta schools resulted from the voluntary choice of the community. The district court ultimately found that "racial discrimination existed in the custom and practice of the operation of the Atlanta Public Schools" and ordered respondents to present a plan of desegregation by December 1, 1959 (R. 162). Even then, they waited until the last day of the deadline imposed by the district court to present a desegregation plan. The plan submitted, though scheduled to become effective on September 1, 1960, was expressly made contingent upon State legislative action. The district court, improperly we think,[17] accepted the condition, and the failure of the legislature to act further delayed commencement of the plan until September 1961.

[17] Respondents' duty to obey the Fourteenth Amendment was not dependent in any way upon the concurrence of the State legislature. The Supremacy Clause (Art. VI) of the United States Constitution makes this clear.

In short, the Atlanta school authorities effectively delayed the beginning of desegregation for six years. The delay afforded ample opportunity to prepare for the period of transition. Those years cannot be discounted; they must be added to the three years of actual experience under the desegregation plan. Against this background, it is difficult to understand the contention that, even now, desegregation cannot proceed at a swifter pace than one grade each year.

2. Another circumstance militating against a continuation of the present pace is the downward progression established by the plan. As we have noted, the Atlanta pattern for gradual desegregation begins with the twelfth grade, moving downward one grade a year. It seems clear that such a plan will achieve desegregation more slowly than one that begins at the bottom of the educational system—at least where the whole burden of progress is placed on transfer options.

The reasons are plain. The first-grader, white or Negro, being untutored in the tradition of educational segregation, is more adaptable than the high-school senior who has known nothing else. Predictably, only a few students will seek to make an abrupt change from the school environment and associates they have known for ten or eleven years. Moreover, one of the recognized effects of a segregated education is that Negro students in the upper grades are less prepared to compete in an integrated school system, particu-

larly when, as in Atlanta, the Negro school system is both separate and unequal (R. 101).[18]

The effective elimination of the dual school system is far more likely when the natural progression from the bottom up is followed. And, of course, a greater number of students are affected in the first years when desegregation begins at the elementary rather than the high school level.[19]

3. Perhaps the most compelling reason for accelerating the pace of desegregation lies in the experience under the present plan during the last three years. The results are eloquently told in the small numbers of Negro students who have attended desegregated classes for a year or two: 10 in 1961, 40 in 1962, 119 in 1963 (Br. in Opp. 28). We later explore the cause of this "tokenism" (see Point II, *infra*), but it is evident that failure to achieve effective desegregation even in the grades reached by the plan suggests speeding up the pace in the hope that real progress may result when the cycle is complete.

B. ABSENCE OF JUSTIFICATION FOR FURTHER DELAY

1. When the district court approved the Atlanta plan, it retained jurisdiction of the case "for the purpose of entering such further orders or granting such further relief as may be necessary to bring about com-

[18] See *Monroe* v. *Board of Commissioners of City of Jackson, Tennessee*, 221 F. Supp. 968 (W.D. Tenn.) where the court considers the advantages of commencing school desegregation at the lowest grades.

[19] Indeed, it appears this was one reason the Atlanta school authorities chose to proceed from the top down. See note 22, p. 26, *infra*.

pliance with this decree" (R. 10). Petitioners did not appeal.[20] But it soon became clear that respondents intended to postpone full compliance as long as possible. The first year, 1961, only 10 of the 135 Negro students who applied for transfers were granted permission to enter formerly all-white high schools. The students applying for transfer, moreover, were subjected to a battery of tests and requirements that had to be met only by those seeking their constitutional right. It was in the light of this experience that petitioners returned to the district court for further relief, including an acceleration of the plan of desegregation.[21]

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[20] Petitioners' failure to appeal from the order of the district court approving a grade-a-year plan cannot bar a subsequent motion to accelerate the plan. The second *Brown* decision contemplated that the district courts would retain jurisdiction during the period of transition, 349 U.S. at 301. As a plan of desegregation progresses, it may become clear that more or less time is needed. Courts of appeal have recognized this continuing jurisdiction of district courts to accelerate plans of desegregation. See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209 (C.A. 6); *Aaron* v. *Cooper*, 243 F. 2d 361 (C.A. 8); *Boson* v. *Rippy*, 285 F. 2d 43 (C.A. 5). Here the petitioners sought to test the reality of the alleged administrative problems that had been advanced to justify deferring desegregation. After observing the plan in operation, petitioners became convinced that greater speed was feasible and returned to the district court for additional orders. As Judge Rives stated (R. 245), petitioners "should not be faulted in seeking additional relief because of their willingness, for a period of two years, to permit the Atlanta plan to be tested out without appealing to this Court for any faster relief."

[21] Petitioner asked that the eighth through twelfth grade be desegregated in September 1963, the fourth through seventh grades in September 1964, and the remaining three grades in September 1965.

Acceleration was clearly appropriate. Respondents never demonstrated that this slow a pace was essential in the first place [22] or that—if it was—acceleration has not since become feasible.

2. The district court and the court of appeals suggested that petitioners had the burden of showing that the original plan was no longer adequate and that they had failed to meet this burden (R. 159.

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[22] When first approving the plan, the district court summarized respondents' reasons for delay as follows (R. 19):

"As introductory to the Plan itself the resolution adopting the same states certain pertinent facts confronting the Atlanta Board of Education, and these facts not being refuted by the plaintiffs are taken to be true. Among other things a recital is made that the Board is faced with the task of educating 116,000 pupils, of which approximately forty per cent, or some 46,000 are negroes; that there is at this time a rapid influx of children of school age in the City, that these children vary in achievement and ability: that there is at present a shortage of 580 classrooms, many classes are held in churches and other buildings, and many have double sessions. Other problems confront the Board brought about by slum clearances and changes in residential patterns in various communities.

"The foregoing facts are stated by the Court to illustrate the problems confronting the defendant Board of Education. The Plan abolishes segregation beginning at the twelfth grade, and each year takes in a lower grade until all grades in all schools are included, and should all or a large part of 46,400 negro children apply for assignment at one time, it would of course put an intolerable burden upon the School Board to process their applications and make readjustments in all classes and in all schools. That fact must have been in the mind of the defendants when they proposed commencing the Plan with only the twelfth grade.

"Also, it is recognized that where such a Plan begins with the first grade and extends to the higher grades there is a greater problem as to adequate housing and a greater degree of disruption in initiating the Plan."

243–244). That approach, it seems to us, ignores the nature of the right involved—a "present" right, as *Watson* emphasizes.[23] With the passage of each additional year of segregated schooling, the denial of the equal protection of the laws is perpetuated and emphasized anew. In the most recent proceeding petitioners merely requested that their rights be afforded "here and now" on a more widespread basis. Their renewed demand—for the implementation of present constitutional rights—may well have been sufficient to require those who would withold those rights to justify their actions.

But, in any event, petitioners met any burden that might legitimately be imposed upon them. In their motion for further relief, they complained of the token number of students who had been permitted to breach the barriers and objected to the imposition of special tests on those seeking to transfer (R. 55). Petitioners alleged that the "plan of desegregation proposed by defendants in this case and approved by this Court has not been used by defendants to bring

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[23] In *Watson*, the Court said (373 U.S. at 530–533): "* * * it must be recognized that even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. The second *Brown* decision is but a narrowly drawn, and carefully limited, qualification upon usual precepts of constitutional adjudication and is not to be unnecessarily expanded in application."

about desegregation in the public schools of Atlanta, but, on the contrary, has been used to maintain segregation" (R. 56), and facts were set forth to substantiate this contention. It was shown that the Atlanta school authorities had not made a "prompt and reasonable start toward full compliance." The evidence adduced at the hearing revealed that Atlanta's desegregation plan was not what it appeared to be on its face; it demonstrated the token nature of the plan in its application. It only remained to note the passage of time, which, at once, made the petitioners' claim of right more urgent and suggested that full opportunity had been accorded to the respondents to work out the necessary accommodation.

In that posture of the case, the burden was upon the respondents to rebut the demonstrated need for extensive changes. It is plain they failed to carry that burden.

II

DESEGREGATION IS NOT ACHIEVED BY THE MAINTENANCE OF A DUAL SCHOOL SYSTEM WITH A TRANSFER OPTION

A. THE DUAL SCHOOL SYSTEM

Atlanta continues to maintain a separate system of schools for Negroes and for whites—both in the grades covered by the desegregation plan and those not yet reached. To be sure, a very few schools, formerly all-white, now admit a handful of Negro transferees. But otherwise all schools, whether nominally affected by the plan or not, are reserved exclusively for one

race or the other, and, except as transfers are approved, all children must attend a school of their race. No disclaimer, no contrary "finding," can change these basic facts. The controversy on this point, it seems, is little more than a quibble over labels.

Thus, it may be true that schools are no longer administratively characterized "White" or "Negro," but that surely does not affect the reality. Again, it does not matter that, instead of "official" attendance lines (R. 98) drawn by the "Board of Education" itself (R. 61–62) and indicated on "maps" located in the "central office" (R. 77), the dual school system is reflected on "rough sketch[es]" in the office of the "area superintendent" (R. 77), who, with the help of "local school officials," draws the lines (R. 61–62). Nor is it significant that new students find their school by following their "brothers and sisters" (R. 61), their "friends" (R. 98) or their "neighbors" (R. 60, 61, 62), rather than by being assigned directly from the "superintendent's office" (R. 98). The existence of a dual school system does not depend on lines, or maps, or assignments—much less by whom they are made. The only relevant question is whether children are initially restricted to schools of their own race, subject only to a transfer which must be applied for and which is granted on satisfying stated conditions.

That is the situation here. It is conceded that for the elementary grades (unaffected by the desegregation plan), two sets of schools are maintained, one for each race, without the slightest attenuation (R. 61, 62, 98). Apparently, no rigid attendance lines are drawn, so that some students have a choice of schools;

but the Atlanta school superintendent was clear that the rules were not so relaxed as to permit a Negro child to attend a "white" elementary school (R. 98, 105). Indeed, as of 1962, there had been "no change in the elementary situation" existing in 1960 (R. 61), when Atlanta admittedly had "a segregated school system" (R. 98). And, in June, 1963, the court below (albeit in a footnote that seems to contradict the text of the opinion), expressly noted that "[t]he dual system undoubtedly continues in the grades not yet reached by the plan" (R. 240. See, also, dissenting opinion of Judge Rives, R. 250–251). Nor is there any claim that the dual system for the elementary grades was altered in any respect during the 1963–1964 school year.

The continuance of the dual system in the "desegregated" high school grades is likewise clear. According to the school superintendent, "there has been no attempt on the part of the school system as yet to draw rigid attendance areas that would be applied irrespective of race to the pupils living there" (R. 99). Students progressing from elementary school to high school attend the high school which has "traditionally" received students from their particular school. As of old, the Negro elementary schools feed into the Negro high schools and the white elementary schools feed into the white high schools (R. 62–63, 99–100). The obvious consequence, as the court below recognized, is the perpetuation of the dual school system, at least "in residual form" (R. 240, n. 4. See, also, dissenting opinion of Judge Rives, R. 251, n. 5). In short, even for the desegregated grades, assignments

are still made "[t]he same way, except that [high school students] are subject to transfer upon request" (R. 63). There is no suggestion that, to date, a single Negro has been permitted to attend a desegregated class except after "transferring out" of an all-Negro class upon formal application, duly approved.

To be sure, there is some contention that the decision below requires abandonment of the dual system with respect to high schools next September when grades 8 through 12 will be subject to the desegregation plan. But, at best, that is true only for new students, or those then entering the eighth grade (see R. 241–242). So long as all other high school students are re-assigned to the same school—presumably another four years—the dual system will persist. Indeed, the provision for continued transfers, conditioned on proximity to the new school, assumes that some high school students will receive a desegregated education at the school nearest their home only after having been first assigned to a more distant school and applying for the change.

Moreover, it is far from clear that the desegregation plan, as construed by the court of appeals, will *ever* eliminate the dual school system. For, contrary to the court's apparent assumption (R. 241–242), respondents do not propose, this fall, to "assign" all eighth-graders to the school nearest their home. On the contrary, they oppose rigid school zones (Br. in Opp. 11, 20) and explicitly say they "do not think the Fifth Circuit has demanded the marking off of school zones as rings of iron around each school" (*id.* at 10). The plain inference is that the old

"feeder" system will continue—white students from all-white elementary schools going to the "traditional" white high school and Negro students going from the all-Negro elementary schools to the "traditional" Negro high school—except only that every child shall have the option of attending, instead, the school nearest his home. But attendance at the neighborhood school will not result from a compulsory assignment: it is a mere optional "right (*id.* at 11, 12, 18), presumably accorded only upon request. Labels aside, the new privilege to be initially "assigned" to the school most proximate to the student's home seems to be nothing more than the familiar right of transfer. The upshot, it seems fair to predict, will be the perpetuation of the two-school system, tempered only by the boldness of Negroes who wish to demand entrance to the "white" school, if it happens to be nearer their home.

The perpetuation of a dual school system in which pupils are initially assigned on the basis of race alone condemns the Atlanta desegregation plan. The Fourth Circuit so held in *Jones* v. *School Board of City of Alexandria, Virginia,* 278 F. 2d 72, 76:

> Obviously the maintenance of a dual system of attendance areas based on race offends the constitutional rights of the plaintiffs and others similarly situated and cannot be tolerated. * * * [T]he enforced maintenance of such a dual school system is here specifically condemned.

Quoting *Jones* with approval, the Sixth Circuit has adopted the same rule. In *Northcross* v. *Board of*

Education of the City of Memphis, 302 F. 2d 818, 822–823, that court said:

> Since [the *Brown* case] there cannot be "Negro" schools and "white" schools. There can now be only schools, requirements for admission to which must be on an equal basis without regard to race.
>
> Minimal requirements for nonracial schools are geographic zoning, according to the capacity and facilities of the buildings and admission to a school according to residence as a matter of right. * * *

And the Fifth Circuit itself has so held. In *Augustus v. Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862, 869, the court stated:

> There cannot be full compliance with the Supreme Court's requirements to desegregate until all dual school districts based on race are eliminated * * *. The plan should * * * provide for the elimination of all dual school districts on racial lines at the earliest practicable time.[24]

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[24] The court below, in attempting to distinguish this decision, noted (R. 240): "We do not yet know what method of eliminating the dual system is to be used in the *Escambia County* case." However, a method actually was approved by the District Court for the Northern District of Florida nearly seven months before the court of appeals decision. The order of the district court modifying the original plan (and conforming to the decision of the court of appeals) provided, in part (8 R.R.L.R. 58, 59): "1. New pupils entering the first grade or coming into the County for the first time shall be admitted to appropriate school without discrimination as to race or color. 2. Dual school districts on racial lines shall be eliminated in accordance with the following: a. With reference to the first two grades to be effective for the 1963

So, also, in *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, the same court had required the gradual elimination of the dual school system.

In this light, it is not surprising that the majority opinion below is at pains to question the existence of a dual system, and that Judge Rives, dissenting, concluded that his court was now "stepp[ing] backward from the position it [had] previously taken after long and mature deliberation" (R. 253).

B. THE TRANSFER OPTION

What we have already said suggests that even the most generous transfer provision cannot save a plan under which students are initially assigned by race and may escape from the segregated system only by making formal application. As Judge Wright said in *Bush* (204 F. Supp. 568, 570–571), in language quoted approvingly by the Fifth Circuit (308 F. 2d at 498): "To assign children to a segregated school system and then require them to pass muster under a school placement law is discrimination in its rawest form." The vice is clear: "Negro children cannot be required to apply for that to which they are entitled as a matter of right." *Northcross* v. *Board of Education of the City of Memphis, supra*, 302 F. 2d at 823.

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fall term. b. The School Board shall submit for the consideration of this Court proposed map showing school zone lines to carry out the provisions of paragraph 2a above on or before April 10, 1963. c. With reference to the third grade, such dual zone lines shall be eliminated to be effective for the 1964 fall term, and thereafter such elimination shall be effective as to at least one successive additional grade each successive school year."

But, in any event, the Atlanta transfer option system has other inherent defects. It is true—as respondents stress—that transfers are now rather freely permitted in the desegregated grades. Initially, Negro students seeking transfer to "white schools" were subjected to patently discriminatory requirements. Today, these have, in the main, been eliminated. See *supra*, p. 13. At the present time, subject to certain limited exceptions,[25] a student in one of the desegrated grades will be granted a transfer if the school which he wishes to attend is the school closest to his home. Yet, despite this seeming simplicity, the plan remains discriminatory and is not calculated to achieve desegregation.

White students continue to attend schools "traditionally" attended by members of their race without regard to the availability of a Negro school closer to their homes. Similarly, a Negro child will attend a "Negro school" irrespective of its distance from his home. Negro children can escape these segregated assignments only by affirmatively going forward to seek redress by asking for transfers. But transfers are granted only if the Negro applicant happens to live closer to a "white school" than to the school he is presently attending; white children, on the other hand, are not restricted to their neighborhood schools. If they wish, they can avoid desegregated education merely by remaining at the schools historically desig-

[25] See Br. in Opp. 11, where respondents note that certain physical obstructions such as railroad tracks might preclude a child from attending the school nearest his home.

nated for members of their race—regardless of the distance between those schools and their homes.

Such a transfer plan, superimposed upon a dual school system, is calculated to perpetuate school segregation. It has had this effect in Atlanta. See p. 24, *supra*. Inevitably, when Negro students are required affirmatively to seek an escape from prevailing conditions, far less desegregation will occur than if all students were initially assigned to schools without regard to race. Indeed, the conclusion cannot be avoided that such plans are designed precisely for that purpose: to minimize the scope of desegregation.

C. EFFECT OF THE OVERALL PLAN

The vice of the Atlanta plan would seem to be sufficiently demonstrated in the actual results: Of some 12,000 Negro students in four nominally desegregated high school grades,[26] less than 150 are presently enjoying a desegregated education (Br. in Opp. 7). Plainly, that is no accident of geography. It only remains to deal with the half-spoken claim that the large-scale perpetuation of segregation in the grades affected by the plan of desegregation is "voluntary."

At the outset, it is clear that the duty of the school authorities to achieve desegregation is not discharged by permitting white students to attend schools that

[26] While no exact figure is available, respondents state there are presently "over 14,000 Negro children in the Atlanta high schools" (Br. in Opp. 18), which includes the 8th grade, to be "desegregated" this fall. A fair inference is that the remaining high school grades (9–12) include some 12,000 Negro students.

are not open to Negroes on the same basis. Indeed, *Goss* teaches that even a school board which has eliminated the dual system cannot, consistently with its constitutional obligation, grant "one-way tickets", good only, as a practical matter, when proceeding in the direction of segregation. Yet, that is a feature of the plan in suit: while they are given the option to attend their neighborhood school, which may or may not be a "Negro" school, white students, regardless of residence, are guaranteed admission to a "white" school, where Negroes are not admitted on the same basis, and where few, if any, actually will be enrolled. In short, the situation here is the same as in *Goss*, except only that in Atlanta effective desegregation is defeated by the easier expedient of permitting the white student to remain where he is originally assigned, while in Knoxville the same result was achieved by allowing him to transfer out.

Nor does the option given the Negro student correct the situation. As we have noted, he is originally assigned to an all-Negro school, from which his only means of escape is by affirmatively seeking transfer. This in itself is an unfair burden. But, what is more, the Negro student has no assurance of obtaining a desegregated education. Indeed, even if he lives in a "mixed" neighborhood, his chances are poor. For his transfer to a "white" school, even now, will be approved only if there is no "Negro" school nearer his residence, which, more often than not, will be the case.

Plainly, the Atlanta plan is not designed to achieve desegregation, even at the most deliberate pace. Instead of "devot[ing] every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system," as they were "duty bound" to do, *Cooper* v. *Aaron, supra,* 358 U.S. at 7, the school authorities have shifted the entire burden to the Negro students and their parents, putting obstacles in their path, while at the same time permitting the white students to avoid desegregation by merely staying put. The present plan does not respond to the constitutional mandate. Substantial revision is clearly necessary before it can qualify as a *bona fide* "plan of desegregation."

The obvious remedy is the establishment of a single school zone system which assigns every child reached by the desegregation plan to the school nearest his home. Since Atlanta eschews this easy solution,[27] another possible constitutional alternative would seem to lie in the original New Orleans plan: each child permitted to attend—without application, assignment or transfer—either the former white school nearest his home, or the former Negro school nearest his home, at his option. See *Bush* v. *Orleans Parish School Board,* 5 R.R.L.R. 378; *id.,* 204 F. Supp. 568, 569; *id.,* 308 F. 2d 491, 493.

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[27] Respondents say they "would * * * oppose the drawing of school zones by a Court or even the school authorities. Atlanta has never had a system of zones" (Br. in Opp. 11).

III

DESEGREGATION OF SCHOOL PERSONNEL IS NECESSARY TO ACHIEVE A NONDISCRIMINATORY SCHOOL SYSTEM

The lower courts declined to order respondents to take any steps to eliminate racial discrimination in the treatment of school personnel. We believe that compliance with *Brown* requires a school board to eliminate racial discrimination throughout its school system.

In the second *Brown* case, this Court enjoined the district courts to supervise the effectuation of "a racially nondiscriminatory *school system,*" 349 U.S. at 301 (emphasis added). In *Cooper* v. *Aaron,* 358 U.S. 1, 7, the Court again spoke of bringing about the "elimination of racial discrimination in the public *school system*" (emphasis added). Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties.[28]

[28] The district court here, by retaining jurisdiction of the question of personnel desegregation recognized that this was an aspect of achieving compliance with *Brown.* Other courts, too, have considered personnel desegregation to be an element of *Brown.* See *Augustus* v. *Board of Public Instruction of Escambia County, Florida, supra*; *Jackson* v. *School Board of City of Lynchburg, Virginia,* 321 F. 2d 230 (C.A. 4); *Board of Public Instruction of Duval County, Florida* v. *Braxton,* No. 20294 (C.A. 5, January 10, 1964). In *Braxton, supra,* the Court of Appeals for the Fifth Circuit had before it a district court order which

Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of personnel as well as pupils.

Here, the question of desegregation of school personnel was indefinitely postponed by the district court. In this, we believe, the court erred. At the least, the court should have required respondents to propose a plan for eliminating this form of segregation in the Atlanta schools. Just as a school board has the burden of justifying continued segregation of students it must also justify continued segregation of its personnel. The problems here do not appear serious and no justification has been offered to date.

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prohibited the assignment of teachers and other personnel on a racial basis and prohibited the financing and physical arrangement of schools on a racial basis. The court concluded that this type of relief was contemplated by *Brown* and was recognized as appropriate in *Augustus* and the instant case. The court said (slip opinion, p. 10):

"Where * * * the trial court, which has the first duty with respect to requiring action if none is taken initially by the Board of Education, considers that in order fully to implement the Supreme Court's decision it will be necessary to put an end to the assignment of teachers and other personnel by race to the schools within the Board's jurisdiction we think it can not conceivably be said that such an order goes beyond the permissible range of the trial court's choice of means to put an end to an operation of schools on a racially segregated basis."

CONCLUSION

We conclude that good faith compliance with the constitutional obligation to complete desegregation at the earliest practicable date requires a revision of the Atlanta plan so as to provide (1) an acceleration in the pace of desegregation which will achieve desegregation of all elementary and high school grades no later than September 1965; (2) an elimination of the dual racial school system in the grades reached by the plan; and (3) a reasonably prompt program for the desegregation of school personnel.

Accordingly, we submit that the judgment below should be reversed and the cause remanded to the district court with instructions to revise the desegregation plan in the manner indicated, or to require the school board itself to do so without delay.

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